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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/541,302	12/14/2006	Garry Dean Moppett	02296.002370.	7675
5514 7590 06/27/2011 FITZPATRICK CELLA HARPER & SCINTO 1290 Avenue of the Americas NEW YORK, NY 10104-3800				
EXAMINER				
GEORGE, PATRICIA ANN				
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1789				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary**Application No.**

10/541,302

Applicant(s)

MOPPETT ET AL.

Examiner

PATRICIA GEORGE

Art Unit

1789

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 25 May 2011.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-8, 10-13, 15-23 and 27 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-8, 10-13, 15-23 and 27 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-940)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB-08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-8, 10-13, 15-19, 23, and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Giddey in view of Dudek (2004/0000543).

With regard to the prior art, the phrase "wafer" encompasses a thin piece of food.

Giddey discloses methods of forming a ribbon of food having a plurality of non-concentric convolutions. See the figures.

Figure 3, discloses that a fold (i.e. non-concentric convolutions) is a change in direction of the thin film of at least 180° and that the food is substantially uniformly distributed across the cross section in the thin film; and that on average the smaller folds have an amplitude in the range from approximately 0.1 to 0.5 millimeters and although that range is a preferred embodiment, the average amplitude of the smaller folds may be outside that range to obtain various final product structures.

In column 4 abridging column 5, starting at line 60, Giddey teaches that the parameters of the process can be altered to obtain food products having different

ingredients, however, Giddey is not specific as to the creation of confectionary products, as in claim 10; molded confectionary product, as in claim 23; and pet food as disclosed in applicant's own specification.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to modify the types of food which are formed having a wavy ribbon shape, as Giddey, to include the specifically claimed types of food, confections, because one of skill in the art would have a reasonable expectation of success based on the teaching of Giddey which illustrates that a wavy ribbon of food is suitable for the intended use of a variety of food types.

Giddey illustrates a variety of food products having a variety of turns (see figures, and col. 4 abridging 5), and further teaches that the amount of turns are dependent on the process parameters which can be altered for the desired results. See reference starting at the Summary of Invention.

Giddey does not disclose the specifically claimed amount of turns that the ribbon makes when the product is formed, such as:

12/cm² of cross section area, as in claims 1 and 10;

14/cm² of cross section area, as in claims 2 and 15;

20/cm² of cross section area, as in claims 3 and 16;

25/cm² of cross section area, as in claims 4 and 17.

However such a step would be obvious, because one of skill would have a reasonable expectation of success in the teaching by Giddey which illustrates that the amount of turns are dependent on the process parameters which can be altered for desired results.

It would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify the food which is formed having a wavy ribbon shape, as Giddey, to include a range which illustrates the amount of turns the ribbon takes in the food wafer, including the specifically claimed ranges, as in claims 1-4, 10, and 15-17, because one of skill would have a reasonable expectation of success in the teaching by Giddey which illustrates that the amount of turns are dependent on the process parameters which can be altered for the desired results, and further since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 220 F.2d 454, 105 USPQ 223 (CCPA 1955).

Giddey teaches particular success has been experienced using a rigid sharp blade in contact with the roll. The desired product form consisting of the folded structure results when a sharp blade contacts the roll at an angle between 130 and 160 degrees from a plane tangent to the roll surface at the location where the blade contacts the roll, which reads the change of direction of the wafer ribbon is: at least 90 degrees, as in claims 5 and 18; and at least 135 degrees, as in claims 6 and 19. See reference starting at top of col. 5.

Although Giddey teaches that the size of the wafer is dependent on the process parameters used for making it, Giddey is silent as to the ratio of cross sectional edge to length to average cross sectional area of the rippled wafer, such as greater than $2/re$, as in claims 7 and 12; and $4/re$ as in claims 8 and 13.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to modify the food wafer formed having a wavy (i.e. rippled) ribbon shape, as Giddey, to include the ratio of cross sectional edge to length to average cross sectional area of the rippled wafer, as claimed, because one of skill would have a reasonable expectation of success in the teaching by Giddey which teaches that the size of the wafer is dependent on the process parameters used for making it (i.e. a result effective variable), and further since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 220 F.2d 454, 105 USPQ 223 (CCPA 1955).

In column 4 abridging column 5, starting at line 60, Giddey teaches that the parameters of the process can be altered to obtain food products having different ingredients, however, Giddey is not specific as to the composition that forms the ripple being of a baked flour-based material, as claimed.

Dudek illustrates that it is known to produce flour based baked ripple food products. See reference starting at para. 0042.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to modify the making of a rippled food product wherein the parameters of the process can be altered to obtain food products having different ingredients, as Giddy, to include the ripple is a baked flour-based material, as specifically claimed, because one in the art would have a reasonable expectation of success in the teaching of Dudek, which illustrates that the art finds baked flour-based material as being suitable for the intended use of making a rippled food product

As for claim 10, and a cross sectional area that is the volume of the formed wafer divided by the length of the formed wafer, such a step would be a matter of design choice.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to modify the method of making a food product with a cross sectional area, as Giddey, to include a step wherein the cross sectional area is the volume of the formed wafer divided by the length of the formed wafer, as claimed, because a step toward the size and shape of the food product would be a matter of design choice.

Referring to claim 11, applicant claim is toward a process step while the base claim is toward a food product, however, Giddey illustrates that a continuous step produces a three dimensional rippled wafer which is formed in a single step.

Claim 27 is toward a product by the process as in claim 1. The modified method of Giddey provides a similar product to that claimed, including a structure which is similar to that claimed. Therefore, since the product is defined by the process steps by which the product is made, and a similar structure is provided by the modified teaching of Giddey, the product as claimed is encompassed by the rejection above.

Claims 20-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Giddey in view of Dudek, as cited in claims 1-8, 10-13, 15-19, 23, and 27 above, further in view of the combination of Clarke and Biggs.

Giddey does not teach that the wavy wafer of food has a variety of layers.

Clarke teaches confectionary foods which have a wavy wafer shape, that include a variety of layers. Clarke discloses the addition of a secondary film (e.g. solid, liquid, etc.) that is added to the thin film, as layers of ice cream and chocolate, as in claims 20-21. See reference starting at page 16, line 23.

Biggs also discloses filling a confectionary wafer during or after shaping it into a desired shape with a food material, e.g. ice-cream, wherein the wafer is pre-coated with a layer of chocolate (i.e. shell), as in claims 20-22. See reference starting at page 4, line 10; and as seen in example IV.

Biggs further discloses a wafer that is shaped into any desired form, for example it can be rolled, folded, bent, etc (Biggs; page 4, line 10-11).

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to modify the making of a rippled food product wherein the

parameters of the process can be altered to obtain food products having different ingredients, as in the modified teaching of Giddey, to include a variety of structures which are found to be effective, such as a soft layer partially surrounded by the wafer and a hard shell, as in claim 20, because one of skill in the art would have a reasonable expectation of success in the combination of Clarke and Briggs which illustrates that wavy wafer foods are known to have soft ice cream inner layers and hard chocolate outer shells.

Response to Arguments

It is asserted that since applicants' intended use is toward a confection that the reference of Giddey is not commensurate with a confection.

In response, applicant appears to claim only the rippling property of a food product, and therefore since the claim is not toward the components in the composition, and the applied references are toward the rippling properties of food products they are commensurate with the claimed subject matter.

It is asserted that the reference of Giddey fails to teach applicants' intended use, a "baked flour based rippled wafer", nor does the reference of Dudek.

In response, the reference of Giddey was not applied to teach applicants' intended use, however, Dudek illustrates that it is known to produce flour based baked ripple food products. See reference starting at para. 0042.

It is asserted that because Giddy is toward the intended use of a meat product and Dudek is toward the intended use of a flour product the two are improperly combined as different intended use imply the teaching away of said references.

In response, applicant claims a rippling feature of a food product, and since both references teach about rippling food products they are both commensurate with the claimed subject, and analogous art. In regard to a showing of teaching away, applicant fails to provide evidence of such a teaching and therefore this argument is merely an opinion and has no weight.

It is further asserted that none of the references teach the following limitations

- (i) having a plurality of non-concentric convolutions,
- (ii) having an average of at least 12 turns/cm² of cross sectional area,
- (iii) a turn that is a change in direction of the wafer ribbon of at least 45° and
- (iv) a cross sectional area that is the volume of the formed wafer divided by the length of the formed wafer.

In response:

(i) Giddey discloses methods of forming a ribbon of food having a plurality of non-concentric convolutions. See the figures.

(ii) Giddey illustrates a variety of food products having a variety of turns (see figures, and col. 4 abridging 5), and further teaches that the amount of turns are dependent on the process parameters which can be altered for the desired results. See reference starting at the Summary of Invention.

Giddey does not disclose the specifically claimed amount of turns that the ribbon makes when the product is formed, such as 12/cm² of cross section area, as in claims 1 and 10, however such a step would be obvious, because one of skill would have a reasonable expectation of success in the teaching by Giddey which illustrates that the amount of turns are dependent on the process parameters which can be altered for desired results.

It would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify the food which is formed having a wavy ribbon shape, as Giddey, to include a range which illustrates the amount of turns the ribbon takes in the food wafer, including the specifically claimed ranges, as in claims 1-4, 10, and 15-17, because one of skill would have a reasonable expectation of success in the teaching by Giddey which illustrates that the amount of turns are dependent on the process parameters which can be altered for the desired results, and further since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 220 F.2d 454, 105 USPQ 223 (CCPA 1955).

(iii) Figure 3, discloses that a fold (i.e. non-concentric convolutions) is a change in direction of the thin film of at least 180°, which reads on at least 45°, as claimed.

(iv) Having a cross sectional area that is the volume of the formed wafer divided by the length of the formed wafer would be a matter of design choice.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to modify the method of making a food product with a cross

sectional area, as Giddey, to include a step wherein the cross sectional area is the volume of the formed wafer divided by the length of the formed wafer, as claimed, because a step toward the size and shape of the food product would be a matter of design choice.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to PATRICIA GEORGE whose telephone number is (571)272-5955. The examiner can normally be reached on Tues. - Thurs. between 9:00 am and 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Humera Sheikh can be reached on (571)272-0604. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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